

APPENDIX

FILED

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,

Petitioner

—v.—

SYLVIA L. MENDENHALL

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 5, 1979
CERTIORARI GRANTED OCTOBER 1, 1979



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Cr. 6-80208

THE UNITED STATES

v.

SYLVIA L. MENDENHALL

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2-10-76	Complaint Filed
4-20-76	INDICTMENT
7-23-76	Motion of Defendant Mendenhall To Suppress Evidence; and Notice of Hearing Before Judge DeMascio (No time or date set for hearing).
8-18-76	Government's Answer to Defendant's Motion to Suppress.
9-8-76	Order Re That Hearing On Defendant's Motion to Suppress Is Adjourned To October 18, 1976 at 9:00 a.m.
11-18-76	Memorandum and Order Denying Defendant's Motion To Suppress Evidence As To Defendant Mendenhall, Filed and Entered
11-29-77	Motion Hearing Held to Suppress Evidence—Motion Denied
11-30-77	Order Denying Defendant's Motion for Rehearing on Motion to Suppress.
11-30-77	Stipulation Between Defendant, U.S. Attorney, and Her Attorney
11-30-77	Bench Trial Begins—Bench Trial Held—Bench Trial Ends. Court Judgment of Guilty on Count 1.
11-30-77	Notice of Appeal by Defendant Mendenhall of Final Conviction Entered In This Action on November 30, 1977
1-20-78	Defendant Mendenhall Sentenced—Bond Exonerated

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-5064

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SYLVIA MENDENHALL, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12-12-77	Copy of Notice of Appeal
3-1-78	Certified Record (1 Vol. Pleadings, 2 vol. transcript) filed; and cause docketed.
10-20-78	Judgment of the District Court Reversed Without Opinion (Weick, Lively, and Merritt, JJ.)
12-18-78	Petition For Rehearing With Suggestion for Rehearing <i>En Banc</i> .
1-12-79	Order Vacating Previous Judgment of This Court, Staying The Mandate and Restoring the Case To the Docket As Pending Appeal (Phillips, J.)
4-6-79	Judgment of the District Court Is Reversed and Remanded for Further Proceedings (Edwards, Weick, Celebrezze, Lively, Engel and Keith, JJ.)
4-6-79	Opinion Per Curiam; (Weick, J. Dissenting)
4-30-79	Copy of letter from Clerk of Supreme Court Advising Counsel that time for filing petition for certiorari was extended to June 5, 1979.

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Number 6-80208

UNITED STATES OF AMERICA, PLAINTIFF

—vs.—

SYLVIA MENDENHALL, DEFENDANT

Proceedings had and testimony taken in the above-entitled matter before the HONORABLE ROBERT E. DeMASCIO, United States District Judge, on Monday, October 18, 1976, commencing at or about the hour of 10:20 a.m.

APPEARANCES:

VICTORIA TOENSING, ATTORNEY

On behalf of the Government.

RENE SIEGAN, ATTORNEY

On behalf of the Defendant.

[3]

Detroit, Michigan
Monday, October 18, 1976
10:20 a.m.

THE CLERK: Case number 6-80208, the United States versus Sylvia Mendenhall. Are counsel ready?

MS. SIEGAN: Your Honor, I have taken the opportunity to do some abbreviated research on this point, checking the annotations under Rule 43 of the Federal Rules of Criminal Procedure. I don't think the Rule is real clear as to the circumstances we now face. It certainly states that a Defendant—that the trial cannot continue in the Defendant's absence unless that absence is a voluntary one. It speaks about arguments and conferences in the exceptions. And I suggest to this Court that this hearing is very much like a trial, rather than an argument on a point of law in which an attorney can converse with the Court without a client present.

Witnesses are going to testify. My client has a right to confront those witnesses under the Sixth Amendment to the Constitution. I need her here in order for her to properly exercise that constitutional right. Now, in this brief research that I have done, I have got a—in *United States versus McPherson*, which is a District of Columbia case decided in 1969, an opinion written by Chief Judge Bazelon, [4] and the circumstances in that case were not exactly the same as in this case, but the reason that I'm bringing it to the Court's attention is that it speaks of how one is to determine whether an absence was voluntary.

It appears from reading this case at page 1129—I'm sorry. Did I give you a citation? 421 F2d, 1127. At page 1129, the Court speaks of the fact that the voluntariness of the absence from the courtroom must be determined by whether the warning given to the Defendant was sufficient. In other words, whether he understood he was voluntarily waiving a constitutional right. It also refers to the case of *Johnson versus Zerbst*, and it reiterates the standard which is the constitutional

waiver as an intentional relinquishment or abandonment of a known right or privilege flowing from the United States Supreme Court. And I maintain that this Defendant has not indicated to this Court in any way that she has voluntarily abandoned her constitutional rights. I do not know why she's not here this morning. There may be an excuse that this Court will find suitable. I have not found that she has ever purposely fled from the Court's jurisdiction. She certainly has been negligent on a couple of times, but she has also turned herself in. She has never fled from the jurisdiction. She's always been at the address she said she would be at. So, I maintain this hearing should not take place outside [5] of her presence, and I cannot properly represent her best interests without her presence.

MS. TOENSING: Your Honor, the Government would like to cite the case of *U.S. versus Dalli*, D-a-l-l-i. The cite is 424 Fed2d 45. It's a Second Circuit case in 1970.

The Court basically holds that a Defendant has a right to be present at a suppression hearing. However, that right is not absolute, and that it may be waived on a voluntary basis.

Looking at the facts in the *Dalli* case, there was a Defendant that was from Canada. He did not take the necessary—make the necessary arrangements to be present to cross the border, and the Court held that since he had not contacted the Court, since he had not contacted the prosecution, and since he had not made any arrangements that were necessary for him to go across the border, there was no violation. This constitutional right to not be present at a suppression hearing—the Second Circuit cites *Johnson v. Zerbst*. The cite is 304 U.S. 458, as the precedent for saying that there was, indeed, a voluntary waiver on these facts. I say to you in this present situation, Defendant has not shown up for two previous Court appearances. She certainly knows what that means. And now, on this third time, she has voluntarily shown that she does not want to be present, even though she has received [6] notification from her attorney as was brought out earlier.

THE COURT: In the first instance, the Court cannot agree with your position, Ms. Siegan. In the first place, her voluntary absence is quite clear. This record shows that not only did she not appear at two prior settings of this suppression hearing, but on this date she certainly had adequate notice. You have indicated to the Court that you forwarded a letter. You communicated by telephone. The mother of the Defendant said, yes, she received that letter. You have not heard from her. She is not in a position either through her legal counsel, or anyone else, to explain to this Court or to the lawyer who is ready for this proceeding, why she is not here. Her mother indicated to you that she does not know where she is at. She thinks she is in Detroit and is going to appear. This is a case where the Defendant has been entirely at liberty. Indeed, she has a constitutional right to be present. She has a constitutional right to have this Court make Findings on a suppression hearing. But that constitutional right that she has is qualified by the requirement that she be here when the Court is prepared to afford her the constitutional right that she claims she is entitled to.

She has clearly voluntarily absented herself. And *United States versus Dalli* is in point authority for the proposition that a suppression hearing may go forward [7] without her. And if it were otherwise, this Defendant could have it within her means to set this Court's schedule to time the suppression hearing when and if she pleased to have it. She could, at the same time, continually delay the trial on the issue of guilt. In short, she could be in charge of her entire destiny after having committed an offense. That cannot be. These proceedings will go forward.

MS. TOENSING: The Government is ready to proceed if you would like me to call my first witness, your Honor.

THE COURT: Yes.

MS. SIEGAN: I move that the Court sequester any other Government witnesses that may be asked to testify in this matter.

THE COURT: Are there any other witnesses present?

MS. TOENSING: Yes, your Honor. Ms. Mercier from the airport.

Your Honor, at this time I would like to call Special Agent Thomas Anderson to the stand.

THOMAS ANDERSON

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified upon his oath as follows:

[8] DIRECT EXAMINATION

BY MS. TOENSING:

Q Will you state your name, please?

A Thomas R. Anderson.

Q And your occupation?

A I'm a Special Agent with the Drug Enforcement Administration.

Q How long have you been employed with the Drug Enforcement Administration?

A I have been with the Drug Enforcement Administration approximately seven years. Prior to that—I'm sorry. I'll qualify that.

I've been with its predecessor agency as well as the Drug Enforcement Administration approximately ten years total.

Q And what kind of training have you had for this?

A Well, I have gone through the basic agents' training school, which is in Washington, D.C. for approximately sixteen weeks. I have attended a number of followup seminars in Washington, as well as here in Detroit.

Q What is your present assignment with the DEA?

A I'm assigned as a special agent with the Metropolitan—Detroit Metropolitan Airport detail.

Q How long have you been at the airport?

A Just over a year.

[9] Q And in that time, approximately how many arrests have you made that involved illegal narcotics?

A I have either made, myself, or been involved in approximately one-hundred arrests.

Q Were you on duty February 10, at approximately 6:25 a.m.?

A Yes, I was.

Q What was your assignment at that time?

A I had just begun a routine shift. We work more or less on a shift basis out at Metro, the shift beginning just before six and ending around four in the afternoon.

Q What are your duties in connection with the airport?

A We are looking for people who are bringing narcotics through Detroit Metropolitan Airport.

Q And looking for people who bring narcotics to the airport, do you use such a thing as a drug profile or—pardon me, a profile?

A What we are looking—you may call it—that would be just a term to use. You may call it that. I would consider it to be just a number of things that, through our experiences, we have been able to observe that are just not normal for the average individual coming through the airport. It's made up of a number of characteristics.

Q Could you list a few of these characteristics?

A One would be for a person to be traveling under an alias, an [10] assumed name, extreme amount of nervousness, a person traveling from what we consider to be a source city for narcotics, switching flights, arriving on one flight—I'm sorry, leaving on one flight or one particular airline, coming back on another airline, switching possibly midway or enroute to their destination to a different airline, little or no baggage. These are some of the things.

Q On February 10, 1976, at approximately 6:25, what flight were you watching?

A Myself and another agent working with me, Special Agent David Myhills, who is assigned with the Alcohol, Tobacco and Firearms Unit, he works for that agency. He was on assignment with the DEA on the airport detail. We both were observing passengers as they arrived on Flight 218 from Los Angeles, California, American Airlines.

Q Do you know where Mr. Myhills is today?

A I talked with him last week. He was sick.

MS. SIEGAN: Objection, your Honor. It sounds like it's going to be an hearsay answer.

THE COURT: Overruled. If you are going to make an objection, I will recognize you if you stand up.

MS. SIEGAN: Thank you, your Honor.

THE WITNESS: He advised me he was sick. [11] As far as I know, he still is.

Q (By Ms. Toensing): Why would you be watching the flight from Los Angeles?

A Because Los Angeles is probably, in my opinion, the primary source city for heroin coming into Detroit.

Q What did you observe, if anything, from this flight?

A We watched all the passengers exit the aircraft. The last individual to exit the aircraft was a Negro female who we observed as she came from the aircraft down the jetway. She completely scanned the whole area where we were standing.

Q Is there anything significant about you—to you about the person being the last one off the plane?

A Yes. A lot of these people know of our presence at Metro Airport.

MS. SIEGAN: Your Honor, I'm going to object. This witness is now trying to substantiate his testimony. Let's just hear what he has to say about it and let the Court draw the conclusions.

THE COURT: He is not giving his opinion, Ms. Siegan, I do not believe. He is giving us his reasons for believing that the last to deplane has some significance, and I think the question is proper. He may answer it.

MS. SIEGAN: All right.

THE WITNESS: Many times they, knowing [12] that we are watching some of these flights, especially on a flight such as this which arrived very early in the morning—there's very few people around the terminal or in the gate area, they'll be the last one off. Thus, they know that most of the passengers have preceded them and the area should be fairly clear. They can see who is left behind or who may be watching them.

Q (By Ms. Toensing): Did you put her under surveillance at this time?

A Yes, we did.

Q And what occurred at that point?

A She walked very, very slowly down the—she went down the escalator to the lower concourse which leads to the American Airlines baggage claim area.

Q Did she go to the baggage area?

A Yes, she did. She proceeded to the baggage claim area. She did not pick up any bags. She approached a—

Q (Interposing) Wait a minute. Is that significant to you, that she did not pick up any baggage?

A It's significant in the fact that she had traveled a great distance without carrying any baggage.

Q When she did not pick up any baggage, what did she do?

A She approached an American Airlines skycap. I was right behind her. I overheard her ask him as to directions to the Eastern [13] Airlines ticket counter.

Q What did she do at that time?

A She then proceeded up the escalator, up an escalator there into the South Terminal where the airlines ticket counters are located. I followed her up there and she walked directly to the Eastern Airlines ticket counter.

Q Did you observe, or hear anything at that time?

A I did. I stood in line directly behind her, and she retrieved an airline ticket from her purse, presented that to the Eastern ticket agent and asked for a ticket, an Eastern ticket, to be used by her on a flight from Detroit to Pittsburgh.

Q Could you observe the ticket that she had in her hand?

A I could. She held it directly in front of her and I could observe it very easily. The itinerary on the American Airlines ticket showed a flight from Los Angeles to Detroit to Pittsburgh.

Q Was it significant to you that she was already ticketed to Pittsburgh and yet was asking for another flight to Pittsburgh on another airlines?

A Yes, it was.

Q Why?

A In my experience, people will do this. They will ticket on one airline. In this case she was changing enroute to her destination to a different airline. They oftentimes do this in case anyone realizes that the date, the airline, the time that they [14] are to arrive at their destination—deliberately change airlines and flight time to arrive at a different time.

Q What did the Defendant do at that time after she had requested another airline?

A The Eastern representative advised her that her American Airlines ticket was valid, was good, that all she needed was an Eastern boarding pass, which they gave her and she proceeded on down the concourse toward the—to board the Eastern flight.

Q What did you do at that time

A Oh, approximately halfway down the concourse, Agent Myhills and myself approached her, identified ourselves as Federal agents, and I requested some form of identification from the girl.

Q Did she give you identification?

A She produced an Ohio driver's license in the name of Sylvia Mendenhall.

Q Did you ask her for anything else?

A I then asked her if I could see her airline ticket.

Q Did she show it to you

A Yes, she did. She produced the ticket showing the flight itinerary that I previously described. I noted that the name on the ticket was in the name of Annette Ford. I then asked her the reason why she would be traveling under a different name, and her response was, "I just felt like using that name."

Q Did you ask her anything else at that time?

[15] A As I recall, I asked her how long she had been in California, and she stated to me about two days.

Q Is that significant to you?

A In that it's a very short, abbreviated trip to go that distance and return.

Q What did you do next, if anything?

A I then told her that I specifically—that I was a Federal narcotics agent. She became quite shaken, ex-

tremely nervous. She had a hard time speaking. I handed her her ticket back and her driver's license back. She had a very difficult time getting these back into her purse, and at that time I asked her if she would accompany myself and Agent Myhills to our office, which was very nearby, very close, for further questioning.

Q Now, you have testified that you stopped her and began looking for her identification. And now, at this point you asked her to go to the DEA office for further questioning. Would you please approximate how long this took?

A From the time that I just observed her to the time I began to question her.

Q From the time you first stopped her, asking for identification, to the time you asked her to accompany you to the DEA office.

A I would say two or three minutes at the most.

Q What occurred when you went to the DEA office?

A Once inside the office, I asked her to take a seat. She was [16] sitting—I asked her for her consent to search her person as well as her handbag. I stated to her that she had the right to decline the search if she so desired. Her response was "Go ahead."

Q Now, up until this time you had just asked her consent to search her person and her luggage or her bags, could you approximate how long it has been at this time from the initial stop?

A From the initial stop, maybe five or six minutes.

Q All right. What occurred after she said, "Go ahead."

A Special Agent Myhills opened her purse. And among a number of items in her purse was another airline ticket, a United Airlines ticket which had been issued on the seventh of February, showing her flight from Pittsburgh to Chicago to Los Angeles. The name on that ticket was in the name of—the first initial was F. The last name Bush. He asked her if this was the name and this was the ticket that she used on her initial trip to California, and she stated that it was.

Q What happened at that point?

A At that time I placed a telephone call to the Airport Security Police at Metro. I requested that a female officer come to our office to search the Defendant, or search the individual.

Q Is this regular airport procedure when you have a woman suspect?

A Yes, it is.

[17] Q And did someone arrive?

A Yes. A short time later, one of the airport police female officers came to the office, asked Ms. Mendenhall to accompany her to a room there, a private room at the office for the search.

Q When did you see the Defendant again?

A Probably five to ten minutes later. They both exited the room. The police officer handed me a brown paper bag which contained approximately three-quarters of a pound of heroin.

Q What did you do then?

A I placed Ms. Mendenhall under arrest for violation of the Controlled Substances Act. I advised her of her constitutional rights, and then I processed her as a Defendant.

Q Did there come a time when you heard the personal history of the Defendant?

A It was part of this formal processing that I referred to. We take a personal history statement; as far as their name, their address, their date of birth. She stated she was, as I recall, twenty-two years old.

Q Did you learn the educational level of the Defendant?

A She had attended eleven years, or through the eleventh grade of high school.

Q Do you know if she previously had been arrested?

MS. SIEGAN: Objection, your Honor.

[18] MS. TOENSING: May I proceed, your Honor?

THE COURT: Yes.

MS. TOENSING: In order to show a consent search, which is the contention of the Government, there are many factors under *Bustamonte*, and one of the factors is, had the Defendant had encounters previously with the police. I'm bringing the previous arrest record out to show that the Defendant was familiar with police encounters and this would go to the voluntariness of the search.

MS.SIEGAN: I withdraw my objection, your Honor.

THE COURT: All right.

MS. TOENSING: She was asked of any prior arrest history. She stated that she had been arrested once for a traffic offense.

Q (By Ms. Toensing): And is that a previous arrest record?

A As far as the processing part of that, processing is to take fingerprints. The copy of the fingerprints I sent to the Federal Bureau of Investigation in Washington. They in turn send an arrest history back on that individual if they have an arrest history. I received that in the name of Sylvia Mendenhall. She had, according to that, she had two previous arrests; one for shoplifting, another for possession of marijuana.

[19] MS. TOENSING: I have no further questions.

CROSS EXAMINATION

BY MS. SIEGAN:

Q Agent Anderson, when you first stopped Sylvia Mendenhall—pardon me.

When you first saw Sylvia Mendenhall, what drew your attention to her was that she was a black woman traveling alone, and she was the last to get off the airplane, is that right?

A Additionally that she appeared to be very nervous as she came off the airplane.

Q Well, you put her under surveillance because she appeared to you to be nervous and she was the last one off the plane, is that right?

A Not entirely, no.

Q Sir, did she proceed downstairs as one might expect a passenger to do, to check her baggage?

A That's right.

Q And there was nothing unusual about the fact that she went downstairs?

A The fact that she went downstairs, no.

Q But you proceeded to follow her because she appeared to you to be nervous and she was the last one off the plane, is that [20] right?

A As I have testified, she was coming from Los Angeles, which I consider to be a source city.

Q You would acknowledge that on every flight to Los Angeles someone has to be last off the plane?

A Yes.

Q So what was really unusual about this case was this woman appeared to be nervous, is that right?

A She did.

Q All right. Now, in other cases you have a lot of experience in the drug—airport searches for narcotics, don't you?

A I have been involved in a number of them, yes.

Q Over one-hundred, right?

A Arrests. I testified as to arrests.

Q Well, that's what I'm asking you about. You've been involved in over a hundred arrests involving narcotics, right?

A Yes.

Q And one of the things you consider significant is the fact that when somebody does not go downstairs to get their luggage and merely goes off on the concourse on the upper level, is that right?

A For that to be significant, also?

Q Yes, sir.

A It can be.

[21] Q But you do consider that more significant than when someone goes down to the escalators to the baggage area?

A No.

Q You don't consider it more significant than somebody does not go to pick up luggage?

A As I say, it can be. It depends on what they do. Either way, it could be significant, the fact that they go to the baggage claim or the fact that they go to the upper. It could be, but it would have to be coupled with additional facts.

Q All you know about someone is they appear nervous and then they go downstairs to the baggage area, there's nothing unusual about that, is there?

A Other than the fact that she was unusually nervous.

Q But that's the only thing that you knew about her at that point?

A That's correct.

Q Now, have you ever traveled by airplane?

A Yes.

Q And have you ever had a flight that stopped over in another city where you had to change planes?

A Yes.

Q And isn't it your experience that when you change planes in another city where you are not going to stop, but merely pass through, your luggage is transferred from one plane to the other plane for you?

[22] A Remaining with the same airline or a different airline?

Q Let's start with remaining with the same airline.

A Yes, your luggage is transferred.

Q All right. And have you ever transferred airlines?

A From one airline to another?

Q Yes, sir.

A Yes.

Q All right. Have you ever had your luggage transferred for you?

A Yes.

Q So there's nothing unusual about the fact that someone who might be changing planes in Detroit to finish her trip to Pittsburgh would not have her own luggage in her possession, is there, that she would not have picked up the luggage. There's nothing unusual about that, is there?

A Well, at the time that I observed her not to pick up luggage, at that time I didn't know that she was going to transfer, or change airlines.

Q So you certainly didn't consider that unusual then, did you, because you didn't even know what she was doing?

A At that point, I didn't know what she was doing other than the fact that she had come from Los Angeles and she hadn't picked up any bags. I found this significant.

Q All right. Now, you did see her go and stand in line. Indeed, you stood behind her, isn't that right?

[23] A Yes sir.

Q All right. Now, do you know the airline schedule for any airlines that travel nonstop from Los Angeles to Pittsburgh?

A No, not specifically.

Q All right. So then, you don't know there is necessarily a non-stop flight from Los Angeles to Pittsburgh, do you?

A I do not know whether there is.

Q So, there's something significant about the fact that someone might change planes and go from Los Angeles to Pittsburgh and stop in Detroit. You don't have any reason to believe there's something unusual about that?

A Yes.

Q Then you know there's some flights that go non-stop?

A No, but as I say, I observed her ticket. I saw that she was ticketed on American all the way through to Pittsburgh, and I found it unusual that a person would change, after being ticketed all the way through to another airline.

Q Sir, do you know the times and flight that she would have to take from Detroit to Pittsburgh; what time would that plane have left?

A I don't know.

Q What time would the plane have left on Eastern?

A I don't know.

Q So, there's nothing unusual about that. It may be, in fact, [24] something very innocent, isn't that true? It may be that she had to wait longer for the American flight and she found she could take an Eastern flight which would leave sooner, isn't that true? You don't know, do you?

A I don't know the flight time, so I really couldn't respond to that.

Q And you didn't take the time or trouble to determine that before you put her in custody, did you; before you stopped her, before you interrupted her travel?

A No.

Q All right. When you first approached her you told her you were a Federal narcotics agent, didn't you?

A When I first approached her, I told her I was a Federal agent.

Q A Federal agent?

A Yes.

Q All right. Did she, all of a sudden, get very nervous, more nervous because you told her you were a Federal agent.

A When I first approached her I told her I was a Federal agent. She was not nervous.

Q Did you also tell her at that time you had reason to believe she was carrying narcotics?

A No.

Q Did you have a tip in this case?

A No.

[25] Q You were going strictly on what you saw in the airport, is that right?

A A number of things, what my observations, her response to statements.

Q I'm just asking—

A (Interposing) All right. Itinerary.

Q You're going on what happened on February 10 without any prior information?

A Correct.

Q You did not know that Sylvia Mendenhall was traveling to Detroit with narcotics, did you?

A No.

Q Nor any Negro female traveling from Los Angeles on that date carrying narcotics, did you?

A No.

Q Now, once you had stopped Ms. Mendenhall and asked her for her identification and she produced an Ohio driver's license, were you convinced she was Sylvia Mendenhall from that driver's license?

A Well, I considered that to be an accurate identification for her, right.

Q All right. Were you convinced at that point that she was Sylvia Mendenhall?

A Yes, I asked if that address on the license—I asked if she [26] still resided there. She said she did. We had reason to believe that she was Sylvia Mendenhall.

Q And had she put that identification in her purse and walked away from you, you would have stopped her, wouldn't you, because you wanted to ask her some more questions?

A Yes.

Q All right. Now, after she showed you the ticket with the name, was it Annette Ford, was that the name on her ticket?

A Yes.

Q Now, after she showed you that, you decided you wanted to search her and see if she had any narcotics, isn't that true?

A No, not immediately after that. I asked her a question or two regarding the name on the ticket, why it was not her name. I also asked her as to her length of stay in California.

Q All right. Now, when you asked her to accompany you to the DEA office for further questioning, if she had wanted to walk away, would you have stopped her?

A Once I asked her to accompany me?

Q Yes.

A Yes, I would have stopped her.

Q She was not free to leave, was she?

A Not at that point.

Q How far is the DEA office from where you stopped her?

A Probably not more than fifty feet. You have to walk up a [27] stairwell. It is one story up from the concourse, but very short in distance.

Q It certainly took her out of the line of travel which she was outlining for herself; she wouldn't have gone up there on her own?

A She could have gone to that general area, but she certainly wouldn't have gone to our office.

Q Did you use a key to get in your office?

A Yes.

Q And it's a private office?

A Yes.

Q And the public cannot enter unless they knock and are admitted?

A That's correct.

Q Now, when you called this female officer who came and subsequently searched Ms. Mendenhall, you were present when she told Ms. Mendenhall that she wanted to search her, weren't you; weren't you, she asked her to accompany her?

A Yes.

Q And Ms. Mendenhall was told that you wanted her to be searched by this female officer, isn't that right?

A I had previously asked her for her consent to search her person as well as her handbag. She had given permission.

Q To search her person?

A Yes, her body.

[28] Q And you told her you wanted to search her, is that right?

A That was inferred in my question, as far as the consent to search her person and her handbag, and she agreed.

Q Where were you when Ms. Mendenhall was being searched by the female officer?

A I was in a large room adjoining that she was being searched in.

Q Which room is the one that you enter first when you come in the DEA office at the airport?

A It is a reception area. There's normally a secretary's desk.

Q This large room that adjoins the room where she was being searched, does that come first after the reception area?

A Well, it doesn't necessarily come first; I mean as you come in the reception area, you can either go in a room to your left or a room to your right or a room straight ahead. In other words, they all lead off from this reception area.

Q All right. This room she was taken to, was that far away from the reception area?

A No.

Q Can you just explain to me where that room is located, the one in which she was searched?

A Okay. If you were coming in through the reception area, which is a very small outer area, there's a room

directly in front of you. There's this larger room that I described where I was to the right, another room used to process people to the left. [29] As I say, the one room directly in front, one room on each side.

Q Now, where was the one that Ms. Mendenhall was in?

A The one directly in front as you would walk in.

Q Had she tried to leave that room when she was being accompanied by the female officer, would you have known?

A If she had attempted to leave the room?

Q Yes.

A Well yes, I could say that I would have known.

Q And if she had tried to leave prior to being searched by the female officer, would you have stopped her?

A Yes.

MS. SIEGAN: No further questions, your Honor.

REDIRECT EXAMINATION

BY MS. TOENSING:

Q Agent Anderson, is it significant when someone does not pick up luggage after a flight from California?

A It is significant to me when it's coupled with additional things that a person does.

Q And when you began following Ms. Mendenhall, did you observe that she did not pick up her luggage?

A Yes.

Q When you ask a person for identification, it is customary to ask for only one piece of identification?

[30] MS. SIEGAN: Your Honor, I probably should have objected a long time ago, but Ms. Toensing is using leading questions. But I would like to object at this time to ask the Court to instruct her to ask the witness what he does.

THE COURT: Make your questions more direct.

MS. TOENSING: Certainly, your Honor.

Q (By Ms. Toensing): When you ask for identification from a suspect, how many pieces of identification do you ask for?

A Well, initially I ask for one. Normally a person will produce a driver's license. If they produce a driver's license, I consider that to be accurate identification and I would not ask for anything further. If they do not have a driver's license, then certainly we ask for any additional identification that they may have which would show their name.

Q Why did you ask Ms. Mendenhall for another piece of identification?

A The only thing further that I asked from her was her airline ticket.

Q Do you consider that identification?

A Not in itself, no.

Q Why did you ask her for her airline ticket?

A I wanted to again look at her itinerary, and I wanted to look at the name that she used on the airline ticket to see if that corresponded with the name that she had given me on her driver's [31] license.

Q And when you asked Ms. Mendenhall to accompany you to the DEA office, what reason did you give her for accompanying you?

A To ask her additional questions.

Q Did you, at anytime, say she was under arrest?

A No.

Q What were the exact words you used when you requested the Defendant to consent to a search?

A I asked her for her consent to search her person as well as her handbag, and I stated that she had the right to decline the search if she so desired.

Q Why did you use those words?

A Because I feel that is a proper way to present to an individual a consent search.

Q Why did you have Ms. Mendenhall go to the smaller room for her search rather than remain in the outer room of the DEA office?

A Well, I was not going to have her searched in front of the other agent and myself. It's a private room

in which the female officer could take her in there and search her.

MS. TOENSING: No further questions.

RECROSS EXAMINATION

BY MS. SIEGAN:

Q Could you give me a quote as best you can recall, Agent Anderson, how you asked Ms. Mendenhall for her consent?

[32] A Exactly the way I just stated it.

Q Would you repeat it, please?

A I requested of her—

Q (Interposing) Sir, give me a direct quote from yourself, as if I am Ms. Mendenhall. Speak as if you were asking me, how would you say it to her?

A I would like your consent to search your person as well as your handbag, and you have the right to decline this search if you so desire.

MS. SIEGAN: Thank you, sir.

MS. TOENSING: No further questions, your Honor.

THE COURT: You may step down.

[33] BEVERLY MERCIER

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified upon her oath as follows:

DIRECT EXAMINATION

BY MS. TOENSING:

Q Would you state your name, please?

A Beverly G. Mercier.

Q Your occupation?

A I'm a police officer with Metro Airport Police Department.

Q How long have you been employed there?

A Two-and-a-half years.

Q You had special training?

A Yes, I had three weeks with the Wayne County Sheriff's Department, six weeks with the Detroit Police Academy.

Q Were you on duty February 10, 1976?

A Yes, I was on duty.

Q Were you on duty in the early morning?

A Yes, I was.

Q What was your assignment?

A I was assigned a foot patrol duty that morning. About a quarter to seven, I received a phone call from my office telling me to go and assist the DEA agents on a search of a female.

Q And did you proceed to the office?

[34] A Yes, I did.

Q And what did you observe there when you arrived?

A Upon my arrival at the office, I observed a female, and there were two DEA agents there in the office. I was asked by the DEA agents to give a search on this female. At that time I asked the agents did she consent to the search; they said yes.

Q What did you do at that point?

A At that point I gave the DEA agents my gun.

Q Is that normal procedure?

A That's normal procedure. And then we went into another office where the search took place.

Q Well, would you describe what happened when you went into the other office?

A When I went into the other office, I asked the subject if she consented to the search. At that moment she told me yes, she did. I said okay. It's a strip search. That means everything goes off. And after that, she said—well, she had a plane to catch and I told her—I said, if you don't have anything on you, you don't have any problem. So, she began to unbutton her blouse. After she had taken her blouse off, she pulled out a package. It was a plastic package.

Q Was it in her blouse?

A It was in her brassiere, after which she handed me the package and I took the package. And at that point I told her—I said [35] it was still a strip search, everything had to come off.

Q What did you observe in the package?

A I think it was—I don't know. I can't say what it was. I think it was heroin. I'm not certain.

Q Well, just as far as your eye, I'm not asking you what the chemical analysis of it was, but what was it as far as the description?

A You mean in color content? I think it was brown.

Q What kind of substance was it?

A It was like coffee grounds, or something like that.

Q All right.

A At that point she was taking her time by taking her clothes off. She took her skirt off and she took her pantyhose off and her slip off, and she finally took off her panties, and at that point, she handed me another package that was in her panties and it was wrapped about like that (indicating) in a brown paper bag.

Q And did you open that package?

A No, I didn't open that package because that was turned over to the DEA agents.

Q What did you do after you received those packages?

A I told her she could put her clothes back on and I waited for her to put her clothes back on and I told her—well, I waited for her to put her clothes on. We went out to the office.

[36] Q And what did you do when you went outside the door?

A I handed the two packages, the two bags I had gotten from her.

MS. TOENSING: No further questions.

CROSS EXAMINATION

BY MS. SIEGAN:

Q Ms. Mercier, when you went to the DEA office, you knew you were being requested to search a female for suspected narcotics?

A That's correct.

Q And when you went in and saw the two agents, they again told you they wanted you to search someone for narcotics, is that correct?

A That's correct.

Q And when you have searched other people—have you done this before?

A Yes, I have, yes. This is not the first case.

Q How many times have you done it?

A I can't recall how many times I have done searches on females. I would say maybe in the last two years, maybe ten times, I don't know.

Q Has that always been with the Drug Enforcement Administration, or have you searched women for other reasons?

A I have searched women for other reasons.

Q How many times have you searched people for narcotics?

A I'd say maybe ten times.

[37] Q Ten times?

A I'd say maybe ten. I don't know exactly, but I'd say maybe ten times.

Q How many times have you searched women altogether at the airport?

A I can't recall how many times I have searched women because we do it for the sheriff's department too if there's not a female available on the Wayne County Sheriff's Department. They may call our office for a female to do a search.

Q Have you ever had a case where women didn't consent to the search?

A Never.

Q In all of these cases, the women undress themselves, is that correct?

A That's the normal procedure.

Q You have never undressed anyone, have you?

A No.

Q Now, Ms. Mendenhall was rather reluctant to get undressed, wasn't she?

A I can't say she was rather reluctant.

Q You said—

A (Interposing) She kept saying she had a flight to catch.

Q She kept telling you she had a flight to catch and you said she took her time?

A Right.

[38] Q Okay. And when you went into this room with her, you told her you wanted to search her, is that right?

A I told her that it would be a strip search, and I asked for her consent.

Q Can you give me a quote how you would have said that to her?

A Would you rephrase the question, how I would have said?

Q Pretend that I'm with you in a room and that you have been told to search me for narcotics; how would you tell me that you're going to do it?

A First, I would ask for your consent.

Q How would you?

A Are you consenting to the search?

Q That's how you'd say it?

A Right. And if she says yes, I'll tell her, well, it's a strip search and the procedures are that everything has to come off, all of your clothing articles, your shoes and everything have to come off.

Q When you ask her if she's consenting to the search do you also tell her that she doesn't have to and you will leave her alone?

A I didn't tell her that, no.

Q You just told her you wanted to search her and asked if she was consenting?

A Right.

[39] Q All right.

MS. SIEGAN: No further question, your Honor.

REDIRECT EXAMINATION

BY MS. TOENSING:

Q Did Ms. Mendenhall, at anytime, say she did not want to be searched?

A No.

MS. TOENSING: No further questions.

THE COURT: You may step down.

Anything further?

MS. TOENSING: The Government has no further witnesses, your Honor.

THE COURT: Do you wish to be heard, Ms. Siegan?

MS. SIEGAN: I have no witnesses at this time, your Honor. I would like to argue. Does the Court agree with me that the Government does have the burden?

THE COURT: Yes:

MS. SIEGAN: Then I would like the Government to argue first, then.

MS. TOENSING: Your Honor, it is the Government's contention here that we have a valid investigatory stop, followed by a consent to search. I think what we have to [40] do is just step back a minute on the search-and-seizure question.

THE COURT: Are you contending that the arrest was illegal or—

MS. TOENSING: (Interposing) What arrest?

THE COURT: The agent testified that if she left he would not have permitted her to go.

MS. TOENSING: The agent testified that he was to retain her for further questions, your Honor. The Government contends that as being an arrest, and I would like to present my argument to show you why that is so. The Government contends that police officers have a right to stop a person and to question a person for investigation purposes, and this is a detaining stop. And that as more and more facts are developed to the police officer, he or she may continue to stop and ask further questions of a suspect.

First of all, what I'd like to do is just set out a way that I think the search-and-seizure questions have to be approached. We have to determine at each stage whose activity and whose experience and knowledge we're observing. Now, in a stop, there's really two parts of a stop. Under *Terry v. Ohio*, in order for it to be a valid stop, the first part is, was there a reasonable suspicion that there was a crime afoot. On that part of it, we have to look to the [41] experience and to the knowledge of

the police officer. We could have asked ourselves what, in his experience and knowledge, made him or her believe that there was crime afoot. The Government sets out in this situation what we have that was in the police officer's knowledge. First, we have a flight from a major drug import center. The woman was the last off the plane. As the agent testified, that is significant because many times in his experience as an agent, people carrying illegal drugs are either the first or last off the plane. She was looking around the airport. He described it as nervously. The Government contends that that agent should not only be able to specify, to give specifics as stated in *Terry*, as to what those things are that attracted him to a suspect, but then also present what conclusions this presented to the agent. Looking around, glancing around the airport. To this agent, the suspect appeared nervous. At that point, let's look at the officer's activities. At that point, the suspect was put under surveillance and that was all. Under surveillance. The officer observed that she walked slowly toward the baggage area. However, she did not go to get baggage.

We can't look, when we're studying a search-and-seizure question, we can't say the drugs were there, therefore, there's probable cause. We can't do that with the agent. We can't say she was going to change flights so you [42] should have known it was a suspicious act. To this agent, in his experience, someone from Los Angeles and not picking up baggage is a suspicious activity, prompted him to further investigate when she went to the ticket counter. When he went to go get more information, he picked up more information than was even more suspicious. The suspect at that time had a ticket from Los Angeles to Detroit to Pittsburgh. She was changing flights to go the same distance, just another airline. The agent testified he wasn't aware of the various flight schedules. To him, he didn't know if she was making a better deal as far as time connections. He testified in his experience, people who have been carrying illegal drugs have been known to change flights. Again, the officer is acting on his knowledge and experience and his activities at each point are conducted within that framework. He

didn't promptly go up to the Defendant when she got off the plane and acted nervous and stop her. He stopped her, he's building his case, when he learned that she got a boarding pass and was heading to the Eastern Airline area to board the plane, he stopped her. It is at that point the stop took place. And the Government contends that to not have stopped her would have been—by the way, *Adams versus Williams*, 407 U.S. 143, says the same thing in a little more eloquent language. It says, and it's talking about the *Terry* case also and it quotes: "The Fourth Amendment does not require a policeman to collect the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry v. Ohio* recognizes that it may be the essence of good police work to adopt an intermediate response."

This is the intermediate response.

The first question he asked her was for her identification. When she showed a name on that identification, he asked her for an airline ticket. It was a different name. It was more information coming into the agent's mind now, that there may be a crime afoot, even leading to a probable cause situation. He asked her how long she had been gone, two days, a short trip. And he said, "I'm a Federal narcotics agent." He testified she became nervous. She was shaking. She couldn't put her ticket back into her purse. She was having a hard time talking. It was at that point that the agent said, "I would like you to come with me to the DEA office for further questioning." The scope of the investigation is continually being relayed to the officer. That's the other part of *Terry* that needs to be valid. We have to say, and *Terry* talks about it. It says in an appropriate manner. The first part is in an appropriate circumstance. A person may be stopped, and there, *Terry* says in an appropriate manner. This is an appropriate [44] manner. We're talking about the building of a case and getting more facts, and when the facts continue to add up to be suspicions, then the officer can continue to ask questions.

He asked her to the DEA office, more private place, and at that point he didn't place her under arrest. He asked her would she consent to a search. This is not an arrest. At no time did he tell her she was under arrest. And that's important now, because we're coming to the consent. If he was placing her under arrest, that would be important for her voluntary consent. But when we go to the consent issue, we aren't looking at the activities of the police officer anymore. If he says, well he would have stopped her if she had run out of the DEA office and wanted to leave the DEA office. We aren't concerned now with his thoughts and beliefs. He, at no time, told her she was under arrest. Now, we have to look at the Defendant, the suspect and what she perceives. At this point she perceives she has a question. She is told that she can consent to the search or she can refuse it. She's been placed under arrest before. She is twenty-two years old. She has an eleventh grade education. At this point, we have to look at the facts under *Bustamonte*. Was the fact that she was told that she could refuse the search certainly isn't even necessary under *Bustamonte*. The fact that she was only questioned, never at anytime told she was under arrest, that she has an eleventh grade education and is twenty-two years old and has been under arrest before. These facts yield that she is capable of giving a voluntary consent, and the Government says they have you view this thing, keeping in mind also whose experience, whose activities are to be viewed at what point in time that you can come up with nothing except a voluntary investigation stop is a consent search, is a valid consent search. I will cite—I left the cities on my cases back at my desk. I will give them to your law clerk. I will not belabor you with the facts at this time, but there were two instances where the Court looked very closely at each thing that occurred as an officer began to build the case, and I think the Court would like to read that in order to reach a decision on this.

MS. SIEGAN: This Court has had the opportunity to hear a number of evidentiary hearings on airport searches and has decided in at least three of those cases

that I know of, in facts very similar to this, that the stopping of the individual based on a limited number of these criteria when an individual is not free to leave and is asked to accompany the officer to a more private place is, indeed an arrest. So I cite this Court's own precedent to it. I contend that when Ms. Mendenhall was stopped—

THE COURT: (Interposing) Well, you will have to give me those cases. I have never held or ruled that a mere stop is an arrest.

[46] MS. SIEGAN: No, I'm saying, your Honor, that when the agent asked the individual to accompany him to a more private place, this Court has ruled that this was an arrest although words of arrest were not used.

THE COURT: I have never held that, Ms. Siegan. The closest I have come to that, may be your reference to this Court's opinion in *U.S. versus Blount*, except that Blount had made the statement that she wished to go to the bathroom.

MS. SIEGAN: That's correct, your Honor.

THE COURT: Well, you do not have to have special words to say I want to leave, or I am not going to accompany you. Any word that indicates that—for example, she may have had in her mind that she was going to go in the bathroom and not come out. She may have had many things in her mind, but the point is she made the statement, "I'd like to go to the bathroom," twice.

MS. SIEGAN: That's right, your Honor.

THE COURT: And not getting permission to permit her, I would say an arrest occurred.

MS. SIEGAN: Perhaps I don't understand the Court's ruling in *United States versus Daniels and Hilton*. I have a copy of the Court's opinion in front of me, and it seems to me that the Court says that—

[47] THE COURT: (Interposing) Now, if I remember *Hilton*, I ruled on *Hilton* that there was no justification for the stop.

MS. SIEGAN: That's correct, your Honor.

THE COURT: Because in that case, and that case must be restricted to its own facts, the agent testified in clear terms, that if she had not been accompanied by

Daniels, he would not have even followed her, observed her, stopped her or anything else. So in that case, I think I ruled that when she returned from the bathroom, she was obliged to say, "You may leave, you may accompany us or you may wait here." He did not do either of those things and said, "You are coming with us." And that was the arrest.

MS. SIEGAN: Perhaps I could continue with the facts in this case and convince the Court that when Ms. Mendenhall was asked to accompany Agent Fred Anderson, she was, indeed, under arrest.

THE COURT: Well, Ms. Siegan, perhaps you can clear up a point for the Court.

MS. SIEGAN: All right.

THE COURT: If a person has an airline ticket from Los Angeles to Detroit to Pittsburgh, their luggage, if they had any luggage, would not be removed unless there were arrangements made for the removal. When that plane stopped in [48] Detroit, there would be no removing of luggage from the plane for all passengers who were ticketed to Pittsburgh. Now, that is common knowledge.

MS. SIEGAN: Are you assuming that the same plane went to Pittsburgh?

THE COURT: Yes.

MS. SIEGAN: I'm saying that there were many situations when an individual flies that he is ticketed to stop over in another city, and his baggage is removed for him and placed on another plane.

THE COURT: If that plane is not going to Pittsburgh, then all those who are ticketed from Los Angeles to Detroit to Pittsburgh are going to have luggage removed.

MS. SIEGAN: That's right. And they aren't necessarily going to touch that luggage, your Honor. The airline may move it for them.

THE COURT: May move it where?

MS. SIEGAN: To another plane.

THE COURT: What plane, in this case, would they remove it to?

MS. SIEGAN: The agent testified that she had an airline ticket from—that took her from Los Angeles to Detroit to Pittsburgh.

THE COURT: Then the luggage would [49] have to go to the American Airlines plane.

MS. SIEGAN: That's true. He testified that it was in his experience that sometime people connect on different airlines and that luggage may be moved. Her moves were anticipated. We don't know whether the airline was moving the luggage for her or not. There is no testimony that she had luggage or did not. All I'm saying in argument to this Court that the agent, with the knowledge that he did receive by watching her stand in line and change flights from an American flight to an Eastern flight, the only thing he noticed is that she changed flights. He doesn't know whether she did for her own convenience or whether she had other luggage that was going to fly on the American flight and that she would pick it up in Pittsburgh later. There's nothing wrong with when you pay for your ticket, having put it on the airplane in Los Angeles, your luggage is also ticketed to go to Pittsburgh. If you get there on an earlier plane and you pick up your luggage, there's no indication that the agent took the time to find that information out. And he's asking the Court to assume, just on the face of it, because of the fact that she stopped in Detroit and then went on to Pittsburgh and was changing flights, there's something incriminating about it, or something that should fit in a profile, that there's something that would indicate that she was a suspicious traveler. I'm saying there's nothing suspicious [50] about it. I'm saying it was something done commonly. What he knew about her at the time he stopped her was that she was acting nervous. He does not know why, he does not know whether she was a person who was a poor traveler. This Court could probably take notice of the fact situation. We know from her doctor, and he has attached a motion (sic) that she was pregnant at that time. It's possible that that was affecting her. She was apparently three months pregnant. All we know is she was nervous-look-

ing to him, but he didn't give us any outside information, he didn't attempt to check it, he didn't ask why she looked like she did. He apparently could have found—all we know is she appeared nervous. The fact that she was the last off the plane is of no significance to me. Somebody has to be the last off the plane. It turns out to be a black woman traveling alone. Is that more suspicious than a white woman who is traveling alone? I don't see anything suspicious about the fact that she was the last off the plane.

He says that she was looking around. We don't know whether she was looking for someone, whether someone was possibly going to meet her in Detroit in between flights. There's nothing inherently wrong with the fact that she was looking around. And by the way, the time he saw her looking around, he didn't know she was going to take another flight. So it may be that he could have easily thought, were [51] he not a drug agent looking for people who were curriers, and imagining so much more, being attached to these kinds of insignificant things that people do when they get off the plane. If you just saw someone looking around, you may have thought that she was waiting for someone. Instead, he attached a great deal more significance to it because she happened to be a black woman who was the last person off the plane and appeared to be nervous. He follows her, and she goes down some stairs, or down an escalator and goes to another airline where she is working on getting a flight to Pittsburgh. He doesn't have any information there are non-stop flights to Los Angeles to Pittsburgh, so it appears unusual that someone would stop in Detroit. We have no information about that, and he doesn't take the time to learn it. What does he decide to do instead? He decides to stop her because that's the easiest thing to do. So, it's a lot easier to detain her than to ask his one agent to watch her and the other one to check on it. These are things that could be checked on very quickly. They have access to airport information.

This Court has heard testimony in other cases where whole flight records are available to them. They go to

the right ticket agent and quickly find out information. But they chose not to. Instead, it's easier to stop people and have no feeling of letting them go on until they [52] search them. So, when he stopped her, he did not intend to let her go. When she gave him identification in her own name, she satisfied his inquiry. When he asked her for a ticket, he was already searching. The information he derived off of that ticket is information that he got from her by searching her, by asking for the ticket when she was not free to leave. At that point, he was no longer establishing more factors in order to build probable cause. He had already arrested her. And this is all bootstrapping. It's all hindsight now, to say this was a *Terry* stop; he was just investigating her. He never intended to let her go and he admitted that.

All right. When he asked her to go in the room with him, she was already under arrest. She could not leave.

In *Blount*, as this Court is aware, the reason that it became so significant that Ms. Blount asked to go to the bathroom because Agent Markonni was saying she was free to leave at anytime. Yet, he contradicted himself because she said she asked to go to the bathroom and he wouldn't let her. We don't have that here.

Agent Anderson has testified he would not let her leave. By virtue of his own testimony she was under arrest.

Now, we have the consent that she [53] allegedly gave to him. And again, to Ms. Mercier, was voluntary consent. She was told—she understood she was not free to go. That's probably very clear to this Court. She was in a private office. She saw the man had to use a key to open the office, she was out of the public view alone with two men she did not know who asked her if they could search her person and her handbag. I indicate to this Court that I think it inherently incredible that she would have said yes to him, just merely on the quote that she gave me. That's why I asked for a quote. I asked, "How would you have asked for her consent?" And he said, "I would like your consent to search your person and your handbag, and you have the right to refuse, if you so desire."

I submit to this Court that the woman who was asked this question by a man who said, yes, that she would permit him, she would give consent to allow him to search, did not understand the question. Those are two agents. If she said, "Yes, I consent to the search—", I suggest to the Court that eleventh grade education or not, she did not understand the question. There never was an indication from this agent that he said, and if you consent, we'll have a woman search you. The woman was not called for until after she said yes. She did not know at the time she said yes, if she said it, that she was consenting—that a woman would come. I suggest to the Court that if there was a consent, it was involuntary. She couldn't [54] possibly have known what she was saying.

So I will not belabor the point. I think, first of all, this was not an investigatory stop. It was an arrest, that this search flowed from an arrest. This woman never understood that she didn't have a right to not consent to the search of her person. It's quite clear that she knew she had narcotics on her. We have to remember when we're looking over this case, this individual, of course, had narcotics on her. There's no way to deny that. So, she knew those narcotics were going to be found. We have to keep that in mind. If she were consenting to a search of her person why didn't she just pull them out and hand them to him. Why did she make them go to—through the whole rigamarole if she was really concealing. Why didn't she just hand him the narcotics, then the search would have been merely a perfunctory search to make sure everything was handed over. It just doesn't make sense, it doesn't hold together. And I submit to the Court this was an arrest, that it was a search incident to an arrest and it was without the Defendant's consent. And that it went far beyond the bounds of *Terry v. Ohio*.

MS. TOENSING: Since we have the burden, just a couple of things.

THE COURT: I will give you two minutes.

MS. TOENSING: All right. I'll take [55] two minutes.

I would like to clear up about the flight conversations that occurred here. I would just like to point out that the

problem that arose was because the Defendant was already ticketed to go to Pittsburgh and had the ticket in her hand, the L.A. to Detroit connection and then Detroit to Pittsburgh connection. With that ticket in her hand, she was going to the ticket counter just to change airlines, not to do anything else. She was not getting a new flight to Pittsburgh. She already had her flight to Pittsburgh. She was just changing airlines. And as the agent testified, he has found, in his experience, that when people carrying illegal drugs think that if anyone is following them and see them leave on a certain airline, they cannot pick them up at the end of the flight.

I think that the agent testified that when he was at the DEA office, according to my recollection, is the time he was not—she was not free to go. And when we talk about being on the concourse and he requested her to go to the DEA office, my point was that he stopped her for what—and he requested her to go to the DEA office for further investigation. At no time did he tell her she was not free to leave. That is what would have to go to the consent.

Quickly, the police officer testified she never had a woman refuse to give consent to a search, and [56] there have been women she has searched that have had drugs on them. I think that's just not a factor whether there was consent or not.

THE COURT: All right.

This has a trial date, does it not?

MS. SIEGAN: I don't think it does, your Honor, because of the adjournment that we had asked for.

THE COURT: You mean to say you have successfully kept this off the trial docket? Well, Ms. Siegan I will tell you frankly, this Court is going to render an opinion on it. And if you are correct that this is an illegal search and the evidence should be suppressed, that is one thing. But if the Government should succeed on this, then I trust you had better be ready for trial Tuesday, because this is long overdue.

Court is adjourned.

SUPREME COURT OF THE UNITED STATES

No. 78-1821

UNITED STATES, PETITIONER

v.

SYLVIA L. MENDENHALL

ORDER ALLOWING CERTIORARI, Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.